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Message Text

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H:KJENKINS
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TO USDEL SECRETARY PRIORITY

C O N F I D E N T I A L STATE 183428 TOSEC 190101

E.O. 11652: GDS

TAGS: CSCE

SUBJECT: ACTION MEMORANDUM - STATE DEPARTMENT MEMBER
OF JOINT LEGISLATIVE-EXECUTIVE CSCE COMMISSION
(S/S NO.7615011).
FOR THE SECRETARY FROM HARTMAN, LEIGH AND JENKINS THRU
SONNENFELDT
1. THE PROBLEM

DANTE FASCELL, CHAIRMAN OF THE LEGISLATIVE-EXECUTIVE CSCE COMMISSION HAS CALLED AN INITIAL MEETING OF THE COMMISSION FOR JULY 27. PRIOR TO SUCH A MEETING, THE PRESIDENT MUST APPOINT MEMBERS FROM STATE, DEFENSE AND COMMERCE. THE LATTER TWO DEPARTMENTS ARE PREPARED TO RECOMMEND ASSISTANT SECRETARY LEVEL OFFICIALS, BUT WISH TO KNOW WHO THE STATE NOMINEE WILL BE. THE COMMISSION WILL LOOK TO STATE FOR THE BULK OF ITS INFORMATION AND SUPPORT.
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THE STATE MEMBER WILL HAVE A DIFFICULT ROLE TO PLAY IN GRAPPLING WITH THE CONSTITUTIONAL PROBLEMS POSED BY SUCH A JOINT ACTIVITY IN THE FOREIGN RELATIONS FIELD. THE LEGAL ADVISER'S OFFICE HAS PREPARED DRAFT GUIDELINES FOR

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THE PARTICIPATION OF THE ADMINISTRATION MEMBERS (ATTACHMENT). THIS MEMO EXAMINES THE PROBLEMS INVOLVED IN STATE DEPARTMENT PARTICIPATION IN THE COMMISSION AND THE POSSIBLE ALTERNATIVES FOR STATE DEPARTMENT MEMBERSHIP.

2. BACKGROUND/ANALYSIS.

ON JUNE 3, THE PRESIDENT SIGNED INTO LAW THE FENWICK-CASE BILL CREATING A JOINT LEGISLATIVE-EXECUTIVE CSCE COMMISSION TO MONITOR IMPLEMENTATION OF CSCE PROVISIONS AND TO ENCOURAGE PUBLIC AND PRIVATE PROGRAMS AND PROJECTS RELATED TO THE CSCE. THE COMMISSION WILL BE COMPOSED OF SIX SENATORS, SIX CONGRESSMEN AND ONE PRESIDENTIALLY-APPOINTED MEMBER FROM THE DEPARTMENTS OFSTATE, DEFENSE AND COMMERCE.

THE LEGISLATIVE INITIATIVE FOR CREATION OF THE COMMISSION WAS TAKEN LAST SEPTEMBER BY REPRESENTATIVE FENWICK. ON INSTRUCTIONS FROM C, WE IMMEDIATELY WROTE TO MRS. FENWICK TO INFORM HER OF OUR OPPOSITION. SENATOR CASE INTRODUCED AN IDENTICAL BILL IN NOVEMBER. ON JANUARY 19, WE WROTE SFRC CHAIRMAN SPARKMAN AND HIRC CHAIRMAN MORGAN EXPLAINING IN DETAIL THE PROCEDURES ALREADY IN OPERATION TO MONITOR IMPLEMENTATION OF THE CSCE FINAL ACT. WE ARGUED AGAINST ENACTMENT OF THE LEGISLATION AS SUPERFLUOUS, INAPPROPRIATE AND NOT LIKELY TO ENHANCE THE EFFECTIVENESS OF THE ESTABLISHED MONITORING EFFORT. AS A RESULT, CONGRESS LET THE ISSUE LAPSE FOR SEVERAL MONTHS.

IN MAY, HOWEVER, FASCELL'S HIRC SUBCOMMITTEE HELD A SINGLE DAY OF HEARINGS ON THE BILL, WHICH BY THEN HAD 96 CO-SPONSORS. WITNESSES--ALL IN FAVOR--WERE CONGRESSMEN DERWINSKI, MCDONALD, EILBERG, FENWICK, SENATOR BUCKLEY, AND REPRESENTATIVES OF SEVERAL ETHNIC GROUPS. THE ADMINISTRATION WAS NOT INVITED TO TESTIFY, AND WHEN THIS POSSIBILITY WAS RAISED BY A MEMBER OF THE SUB-
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COMMITTEE, THE CHAIRMAN CITED OUR LETTER TO CHAIRMAN MORGAN AS AN EXPRESSION OF ADMINISTRATION VIEWS. THE SFRC HELD NO HEARINGS. IN MID-MAY THE BILL WAS ADOPTED WITHOUT OPPOSITION IN THE SENATE AND BY A VOTE OF 240-95 IN THE HOUSE.

AT THE END OF MAY, IN RESPONSE TO A REQUEST FROM OMB FOR A STATE DEPARTMENT POSITION, WE WROTE TO DIRECTOR LYNN THAT WE HAD OPPOSED THE BILL, BUT THAT, IN VIEW OF OVERWHELMING CONGRESSIONAL SUPPORT, WE RECOMMENDED THAT THE PRESIDENT APPROVE THE BILL OR ALLOW IT TO BECOME LAW WITHOUT SIGNATURE. AT THAT TIME, WE TELEPHONED THE NSC STAFF TO CALL ATTENTION TO THE POSSIBILITY THAT THE

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PROPOSED COMMISSION MIGHT BE UNCONSTITUTIONAL. THE NSC STAFF INFORMED US THAT AN OPINION ON THIS ASPECT OF THE BILL WAS BEING SOUGHT FROM THE DEPARTMENT OF JUSTICE. (JUSTICE RULED THAT IT WAS NOT UNCONSTITUTIONAL.)

THE NSC STAFF INFORMED US FURTHER THAT, IN VIEW OF THE UPCOMING NEW JERSEY PRIMARY, IT WAS LIKELY THAT THE PRESIDENT WOULD SIGN THE BILL INTO LAW AT A CEREMONY AND MAKE SOME FAVORABLE COMMENTS ON IT.

ALTHOUGH PRECEDENTS EXIST IN DOMESTIC FIELDS, THE COMMISSION REPRESENTS A FIRST ATTEMPT AT JOINT CONGRESSIONAL-EXECUTIVE ACTIVITY IN THE FOREIGN POLICY FIELD AND ITS ACTIVITIES MAY POSE CONSTITUTIONAL PROBLEMS IF THE COMMISSION SEEKS TO DIRECT A FOREIGN POLICY ACTIVITY. IT COULD ALSO SERVE AS A PRECEDENT FOR OTHER MIXED CONGRESSIONAL-EXECUTIVE COMMISSIONS ON FOREIGN POLICY ISSUES.

THE LEGAL ADVISER HAS PREPARED DRAFT GUIDELINES FOR THE EXECUTIVE BRANCH MEMBERS OF THE COMMISSION (ATTACHMENT). IF YOU APPROVE OF THE GUIDELINES, WE WILL OBTAIN THE FURTHER CONCURRENCE OF COMMERCE AND DEFENSE, AND THEN PRESENT THE GUIDELINES TO THE COMMISSION AS A STATEMENT OF THE RULES UNDER WHICH THE EXECUTIVE BRANCH WILL PARTICIPATE IN THE WORK OF THE COMMISSION. IN RESPONSE TO OUR REQUEST, CHAIRMAN FASCELL DELAYED CONVENING THE FIRST MEETING OF THE COMMISSION, BUT HE HAS NOW CALLED AN CONFIDENTIAL

INFORMAL MEETING ON JULY 27. WE UNDERSTAND THIS WILL BE PRIMARILY AN ORGANIZATIONAL SESSION.

THE SENATE AND HOUSE MEMBERS OF THE COMMISSION ARE AS FOLLOWS:

HOUSE	SENATE
FASCELL (D-FLA.), CHAIRMAN	BUCKLEY (CONS. R-NY)
YATES (D-ILL.)	CASE (R-NJ)
SIMON (D-ILL.)	CLARK (D-IOWA)
BUCHANAN (R-ALA.)	LEAHY (D-VT.)
FENWICK (R-NJ)	PELL (D-RI)
BINGHAM (D-LIB.-NY)	STONE (D-FLA.)

CONGRESSMAN FASCELL ADVISES THAT EXECUTIVE BRANCH MEMBERS SHOULD BE AT THE ASSISTANT SECRETARY LEVEL. THE DEFENSE DEPARTMENT IS PREPARED TO RECOMMEND ASSISTANT SECRETARY FOR INTERNATIONAL SECURITY AFFAIRS EUGENE MCAULIFFE AND COMMERCE IS PREPARED TO SUGGEST COUNSELOR FOR LEGISLATIVE AFFAIRS MANSFIELD SPRAGUE, A FORMER ASSISTANT SECRETARY OF DEFENSE FOR ISA. THE DOD HAS

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HELD THEIR NOMINATION PENDING A DECISION ON A STATE DEPARTMENT REPRESENTATIVE.

IN SELECTING THE STATE MEMBER, WE WILL WISH TO HEED

THE FACT THAT FASCELL IS WELL DISPOSED TOWARD STATE'S PARTICIPATION AND HAS TOLD US FRANKLY HE EXPECTS TO LEAN HEAVILY ON US FOR EXPERTISE AND GUIDANCE. IT IS EVIDENT HE BELIEVES WE WILL WELCOME A PREEMINENT ROLE.

ONCE WE PICK THE STATE REPRESENTATIVE, WE SHOULD ASSURE THAT DEFENSE AND COMMERCE HAVE COMPARABLE REPRESENTATION.

3. THE OPTIONS.

WE SEE THE FOLLOWING POSSIBLE ALTERNATIVES FOR THE STATE DEPARTMENT REPRESENTATIVES:

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1. ASSISTANT SECRETARY HARTMAN. THIS CHOICE WOULD GIVE THE STATE DEPARTMENT THE REPRESENTATIVE WITH THE STRONGEST SUBSTANTIVE BACKGROUND ON CSCE AND WOULD BE THE BEST CHOICE TO CONVEY THE ADMINISTRATION'S VIEWS. SUCH AN APPOINTMENT WOULD BE WHAT CHAIRMAN FASCELL HAS IN MIND, BUT THERE COULD WELL BE A DIFFICULT CONFLICT BETWEEN HIS DUTIES ON THE COMMISSION AND HIS DEPARTMENT RESPONSIBILITIES ON CSCE.

2. LEGAL ADVISER LEIGH. THIS CHOICE WOULD PROVIDE US WITH THE REPRESENTATIVE BEST ABLE TO OVERSEE THE FINE LINE WHICH MUST BE DRAWN BETWEEN EXECUTIVE AND LEGISLATIVE FUNCTIONS IN THE OPERATIONS OF THE COMMISSION AND THUS WOULD BE THE BEST CHOICE FOR FORESTALLING POTENTIAL CONSTITUTIONAL DIFFICULTIES. HOWEVER, THIS CHOICE WOULD BE AN INDICATION TO THE CONGRESS OF GREATER CONCERN FOR LEGALITIES THAN SUBSTANCE WITH THE CONSEQUENT RISK THAT FASCELL AND HIS COLLEAGUES WOULD VIEW IT AS OBFUSCATION.

3. ASSISTANT SECRETARY MCCLOSKEY. THIS CHOICE WOULD MAKE IT POSSIBLE TO BUILD ON MCCLOSKEY'S ESTABLISHED RELATIONSHIP WITH CONGRESS. HOWEVER, HE WOULD NOT BE AS STRONG A REPRESENTATIVE ON THE CONSTITUTIONAL PROBLEMS POSED BY THE COMMISSION OR THE SUBSTANCE OF CSCE. SUCH SELECTION WOULD OBVIOUSLY FALL SHORT OF THE CHAIRMAN'S EXPECTATIONS.

4. POLITICO-MILITARY DIRECTOR VEST. THIS CHOICE WOULD GIVE US A REPRESENTATIVE WHO IS FAMILIAR WITH THE BACKGROUND AND SUBSTANCE OF CSCE. (VEST WAS HEAD OF OUR CSCE DELEGATION FOR ONE YEAR) AND WOULD AVOID THE CON-

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FLICTS WHICH MIGHT ARISE IF HARTMAN WERE CHOSEN. IN ORDER TO AVOID CONFUSION OF RESPONSIBILITIES, HE COULD BE GIVEN A SEPARATE TITLE FOR THIS COLLATERAL FUNCTION. FASCELL WOULD LIKELY BE RECEPTIVE TO SUCH SELECTION, BUT

VEST WOULD NOT BE AS EXPERT ON CONSTITUTIONAL QUESTIONS AS THE LEGAL ADVISER.

5. SPECIAL APPOINTEE. APPOINTMENT OF A STATE REPRESENTATIVE FROM OUTSIDE THE DEPARTMENT WOULD AVOID CONFIDENTIAL

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CONFLICTS WITH OPERATIONAL RESPONSIBILITIES. ANY SUCH APPOINTEE, HOWEVER, COULD FEEL LESS COMMITTED TO ADMINISTRATION POLICY THAN A MEMBER OF THE DEPARTMENT AND MIGHT BE DIFFICULT TO CONTROL. GIVEN JUST THE RIGHT MAN, SUCH AN ARRANGEMENT MIGHT WORK. FASCELL WOULD PROBABLY BE RECEPTIVE TO SELECTION OF THE STATE REPRESENTATIVE FROM OUTSIDE THE DEPARTMENT, PROVIDED THE INDIVIDUAL WERE APPROPRIATELY QUALIFIED.

6. COMBINATION OF THE ABOVE. WE COULD INFORM FASCELL THAT ONE OF THE STATE OFFICIALS MENTIONED ABOVE WOULD BE OUR INTERIM REPRESENTATIVE, PENDING IDENTIFICATION OF A REPRESENTATIVE FROM OUTSIDE THE DEPARTMENT. THIS MIGHT NOT BE ENTIRELY SATISFACTORY TO FASCELL, BUT WOULD BE AN EXPEDIENT IF AN OUTSIDE REPRESENTATIVE APPEARS DESIRABLE BUT A SUITABLE CANDIDATE IS NOT IMMEDIATELY AVAILABLE.

4. RECOMMENDATIONS

WE RECOMMEND THE APPOINTMENT OF SOMEONE FROM OUTSIDE THE DEPARTMENT. OUR PREFERENCE IS FOR JOE SISCO, IF HE IS AVAILABLE. IF HE IS NOT IMMEDIATELY AVAILABLE, WE RECOMMEND CHOOSING OPTION 6, SENDING AN INTERIM REPRESENTATIVE UNTIL A REPRESENTATIVE FROM OUTSIDE THE DEPARTMENTCAN BE IDENTIFIED. WE BELIEVE CONSTITUTIONAL QUESTIONS CAN BE ADEQUATELY OVERSEEN BY HAVING THE STATE DEPARTMENT REPRESENTATIVE ACCOMPANIED BY APPROPRIATE LEGAL COUNSEL.

APPROVE DISAPPROVE

PREFER

WE RECOMMEND THAT YOU APPROVE THE ATTACHED DRAFT GUIDELINES FOR EXECUTIVE BRANCH PARTICIPATION IN THE COMMISSION.

APPROVE DISAPPROVE

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ATTACHMENT
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DRAFT GENERAL GUIDELINES ON EXECUTIVE BRANCH
PARTICIPATION IN THE COMMISSION ON SECURITY
AND COOPERATION IN EUROPE
1. GENERAL ROLE OF THE COMMISSION

A. THE FINDINGS AND RECOMMENDATIONS OF THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE (THE COMMISSION) ARE ADVISORY IN NATURE AND ARE NOT BINDING ON THE UNITED STATES GOVERNMENT OR ON THE EXECUTIVE BRANCH OF THE GOVERNMENT.

B. THE OFFICIAL POSITION OF THE US GOVERNMENT WITH RESPECT TO IMPLEMENTATION BY NATIONS OF THEIR COMMITMENTS UNDER THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE WILL BE DETERMINED BY THE EXECUTIVE BRANCH, TAKING INTO ACCOUNT THE FINDINGS AND RECOMMENDATIONS OF THE COMMISSION AND THE CONGRESS.

2. PARTICIPATION IN THE COMMISSION BY THE EXECUTIVE BRANCH MEMBERS.

THE THREE EXECUTIVE BRANCH MEMBERS OF THE COMMISSION WILL SERVE AS REPRESENTATIVES OF ANDSPOKESMEN FOR THE EXECUTIVE BRANCH. THESE MEMBERS WILL NOT SERVE IN THEIR PERSONAL CAPACITIES NOR AS INDEPENDENT EXPERTS, BUT RATHER WILL RECEIVE THEIR INSTRUCTIONS FROM THE PRESIDENT. THE POSITIONS OF THE THREE EXECUTIVE BRANCH MEMBERS WILL BE COORDINATED AMONG THEMSELVES AND WITH THE EXECUTIVE BRANCH.

3. MEETINGS OF THE COMMISSION

A. IT IS UNDERSTOOD THAT THE COMMISSION MEETINGS WILL NORMALLY BE OPEN TO THE PUBLIC, AND THAT CLOSED SESSIONS WILL BE HELD ONLY FOR PURPOSES OF TAKING OR DISCUSSING CLASSIFIED TESTIMONY OR DOCUMENTS.

B. IF THE COMMISSION DECIDES TO HOLD AN OPEN SESSION NOTWITHSTANDING A REQUEST BY THE EXECUTIVE BRANCH MEMBERS FOR A CLOSED SESSION, THE EXECUTIVE
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BRANCH MEMBERS MAY BE INSTRUCTED TO ABSTAIN FROM PARTICIPATION IN SUCH OPEN SESSION.

4. WITNESSES

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A. OFFICIALS OF THE EXECUTIVE BRANCH, OTHER THAN EXECUTIVE BRANCH MEMBERS OF THE COMMISSION, MAY APPEAR AS WITNESSES BEFORE THE COMMISSION SUBJECT TO INSTRUCTIONS FROM THE AGENCY HEAD OR, WHERE APPROPRIATE, THE PRESIDENT.

B. EXECUTIVE BRANCH MEMBERS OF THE COMMISSION MAY EXAMINE EXECUTIVE BRANCH WITNESSES ON PARTICULAR QUESTIONS,

AS WELL AS ANY OTHER WITNESSES CALLED BY THE COMMISSION.

C. EXECUTIVE BRANCH MEMBERS OF THE COMMISSION MAY THEMSELVES APPEAR AS WITNESSES.

D. TESTIMONY CLASSIFIED BY THE EXECUTIVE BRANCH WILL BE HEARD BY THE COMMISSION ONLY IN CLOSED SESSION.

5. COMMISSION REQUESTS FOR AND TREATMENT OF EXECUTIVE BRANCH DOCUMENTS

A. NO CLASSIFIED INFORMATION ORIGINATING IN THE EXECUTIVE BRANCH AND GIVEN TO THE COMMISSION MAY BE DECLASSIFIED OR RELEASED WITHOUT THE AGREEMENT OF THE EXECUTIVE BRANCH.

B. INFORMATION CLASSIFIED BY THE EXECUTIVE BRANCH AND GIVEN TO THE COMMISSION WILL BE ACCORDED THE NORMAL SECURITY PROTECTION.

C. UNAUTHORIZED DECLASSIFICATION OR RELEASE OF CLASSIFIED INFORMATION GIVEN TO THE COMMISSION BY THE EXECUTIVE BRANCH MAY REQUIRE A SUSPENSION OF TRANSMITTAL OF SUCH MATERIAL TO THE COMMISSION.

6. REPORTS TO THE CONGRESS AND OTHER COMMISSION DOCUMENTS AND STATEMENTS

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A. IN PREPARING COMMISSION REPORTS TO THE CONGRESS, OR OTHER DOCUMENTS OR STATEMENTS TO BE ISSUED BY THE COMMISSION, THE POSITION OF THE EXECUTIVE BRANCH MEMBERS WILL BE FULLY COORDINATED AMONG THEMSELVES AND WITH THE EXECUTIVE BRANCH.

B. IN CASES IN WHICH THE EXECUTIVE BRANCH MEMBERS FEEL OBLIGED TO DISSENT FROM A POSITION TAKEN BY THE MAJORITY OF THE COMMISSION, THE FILING OF A MINORITY REPORT WILL BE APPROPRIATE.

7. VOTING

A. THE EXECUTIVE BRANCH MEMBERS WILL ATTEMPT, INSO-

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FAR AS POSSIBLE, TO HAVE DECISIONS IN THE COMMISSION REACHED BY CONSENSUS RATHER THAN BY FORMAL VOTING PROCEDURES.

8. CONTACTS WITH FOREIGN GOVERNMENTS

A. REQUESTS BY THE COMMISSION FOR INFORMATION FROM

FOREIGN GOVERNMENTS WILL BE PRESENTED TO THE EXECUTIVE BRANCH FOR TRANSMITTAL THROUGH DIPLOMATIC CHANNELS.

B. ANY NEGOTIATIONS ON BEHALF OF THE US GOVERNMENT WITH RESPECT TO QUESTIONS INVOLVING THE FINAL ACT WILL BE UNDERTAKEN BY AND AT THE DIRECTION OF THE EXECUTIVE BRANCH.

5. DRAFTED: EUR/RPM:JJMARESCA; CLEARED: M:LEAGLEBURGER; PM:GVEST; C:HSONNENFELDT.

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